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Foreword: Symposium: Advanced Issues in Electronic Discovery: The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules

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FOREWORD

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SYMPOSIUM
Advanced Issues in Electronic Discovery: The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules

Advances in electronics—computers, the Internet, email—are touted as time savers. They have also resulted in an exponential multiplication of communications. Today most business transactions, as well as many personal interactions, result in some type of computerized record. If discovery in litigation were limited to paper "documents" not generated by computers, the bulk of valuable "documentary" evidence would likely be missed. This fact of twenty-first century life has led to a tremendous boom in "electronic discovery."

Imagine, for example, a divorce case brought against a vice-president of a corporation on the ground of adultery. The plaintiff seeks to discover the defendant's text messages, calendar, and incoming and outgoing phone call records from his Blackberry. She asks for the records of his automobile's GPS device. She subpoenas his corporate employer for the hard drive to the defendant's desktop and laptop computers, all of the defendant's incoming and outgoing emails for the last five years, and the metadata related to them, showing the date, time, and content of any alterations made to them.

The vice-president's emails may contain references to corporate trade secrets and to attorney-client privileged matters between him, house counsel, and outside counsel, totally unrelated to the divorce action. The corporation learns it will cost substantial sums that exceed the economic value of the case to hire forensic computer experts and lawyers to preserve and cull all privileged matters from the emails.

How would you advise the corporation? Under generally applicable privilege law, if a privileged communication is disclosed in this case, the corporation will have lost the privilege as to that

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subject matter[1] forever and to the world.[2] Simply turning over all the records, without having performed a privilege review, is thus out of the question. A "nonwaiver" agreement between the parties may not provide sufficient protection under substantive law.

In response to the overwhelming nature of these problems when associated with electronic discovery, there have been recent amendments to the federal and Maryland rules, the beginnings of which can be traced to 1996, when Judge Paul Niemeyer of the United States Court of Appeals for the Fourth Circuit created the Discovery Project of the Federal Advisory Committee on Civil Rules. The subject has also been studied in depth at The Sedona Conference in Arizona, resulting initially in the publication of the first edition of *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* in January 2004, and many subsequent publications.

The federal committee published proposed amendments to the civil discovery rules for comment in August 2004. While these were pending, Chief Magistrate Judge Paul Grimm of the United States District Court for the District of Maryland provided a clear and detailed explication of these problems, including the question of waiver of privilege, in his opinion in *Hopson* in 2005.[3] The amendments to the Federal Rules of Civil Procedure became effective in December 2006.

In early 2007, the United States District Court for the District of Maryland published on the court's web site a "Suggested Protocol for the Discovery of Electronically Stored Information" which provides invaluable guidance to counsel engaged in federal litigation. On the state level, the Conference of Chief Justices promulgated and approved, in August 2006, Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information.

In 2006 the Chair of the House Judiciary Committee of the United States Congress urged the Judicial Conference of the United States to propose rules that would resolve the privilege issue. The Advisory Committee on the Federal Evidence Rules—requesting and receiving testimony from Judge Grimm—proposed Federal Rule of Evidence 502 which would codify suggestions Judge Grimm had made in *Hopson*. The proposed rule was approved by the Standing

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1. *E.g.*, Rogers v. United States, 340 U.S. 367 (1981).
2. *See* proposed FED. R. EVID. 501 advisory committee's note ("[O]nce confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant.").
3. Hopson v. Mayor & City of Baltimore, 232 F.R.D. 228 (D. Md. 2005).

Committee on the Federal Rules of Evidence in June 2007, then by the Judicial Conference in September 2007, and awaits approval by Congress.

The Court of Appeals of Maryland's Standing Committee on Rules of Practice and Procedure appointed a subcommittee to propose corollary rules, regarding both discovery and privilege, for Maryland trial courts. The final work product, as approved by the Court of Appeals of Maryland, went into effect on January 1, 2008. Unlike the federal rules in effect to date, the Maryland Rules address the privilege issues raised in *Hopson.*

On March 13, 2008, the *University of Baltimore Law Review* sponsored, together with the University of Baltimore Law School's Snyder Center for Litigation and the Litigation Section of the Maryland State Bar Association, a symposium on "Advanced Issues on Electronic Discovery: The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules." The participants have all been in the forefront of the study of this subject, either at the federal or state level or both.

We were honored to have Professor Richard Marcus of the University of California Hastings College of Law, a Special Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, who played a pivotal role in drafting the federal discovery rule amendments, present the keynote speech. In his address on "E-Discovery Beyond the Federal Rules," which is reproduced in this issue,[4] Professor Marcus described (1) the vastness of e-discovery and the development of a niche for vendors to perform such work; (2) the evolution of the amendments to the Federal Rules of Civil Procedure; (3) corollary work in Texas, Maryland, and California; and (4) international legal developments. He shared with the large audience of lawyers, students, faculty, and judges his prognostications as to the developments that will occur in the next decade.

Professor Marcus's address was followed by a distinguished panel on "The Impact of the First Year of the Federal E-Discovery Rules." Judge Grimm served as moderator, posing questions to Magistrate Judge John M. Facciola of the United States District Court for the District of Columbia and Courtney Ingraffia Barton, Esq., a vice-president of a leading vendor in this area, LexisNexis Applied Discovery. Judge Facciola, who has authored groundbreaking

4. *See* Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321 (2008).

opinions on e-discovery,[5] shared his insights on the success of the collaborative "meet and confer" procedure and his concerns regarding the degeneration of the relationship between in-house and outside counsel that may result from *Qualcomm*.[6] Ms. Barton shared practice tips, such as to be explicit as to the form of production you seek, and explained the availability of the relevant case law at AppliedDiscovery.com and of pleadings at the LexisNexis Court Links web site.

The federal panel was followed by an outstanding state panel, which provided "An Introduction to Maryland's E-Discovery Solutions." Michael D. Berman, Esq., who played a key role in developing the Protocol on E-Discovery for the United States District Court for the District of Maryland, moderated the discussion. Judge Joseph F. Murphy, Jr., of the Court of Appeals of Maryland, who had served as Chair of the Rules Committee when Maryland's e-discovery rules were developed, discussed cases that might be analogous to e-discovery issues, including his opinion for the Court of Special Appeals in *Elkton Care*.[7]

Robert Dale Klein, Esq., who had chaired the subcommittee responsible for drafting the Maryland rules, explained the differences between the Maryland and federal rules. Judge Dennis M. Sweeney, who was also a member of the Rules Committee during the pertinent time, and who recently retired from the Circuit Court for Howard County, Maryland (but continues to hear cases as needed), commented on his experiences with e-discovery. Michael D. Berman, Esq. noted that, while electronic discovery presents many risks and costs, it also creates great opportunities for creative lawyering. Business has migrated to computers because they are efficient, and the legal system has no alternative but to adjust to this changing paradigm.

This issue contains articles addressing as yet unresolved issues regarding the preservation of electronically stored information. In the

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5. *See, e.g.*, D'Onofrio v. SFX Sports Group, Inc., 247 F.R.D. 43 (D.D.C. 2008); Hubbard v. Potter, 247 F.R.D. 27 (D.D.C. 2008); Smith v. Café Asia, 246 F.R.D. 19 (D.D.C. 2007); Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth., 242 F.R.D. 139 (D.D.C. 2007); Peskoff v. Faber, 240 F.R.D. 26 (D.D.C. 2007); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001).

6. Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated and remanded in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

7. Elkton Care Ctr. Assoc. Ltd. Partnership v. Quality Care Mgt., 145 Md. App. 532, 805 A.2d 1177 (2002) (finding, under particular facts of case, inadvertent disclosure of privileged document waives attorney-client privilege).

first article, Kenneth J. Withers, the Director of Judicial Education and Content for the Sedona Conference, tackles the question of a party's duty to preserve ephemeral electronically stored information (such as "random access memory") that may be subject to discovery.[8] An article coauthored by Judge Grimm, Michael Berman, Conor Crowley, and Leslie Wharton tackles the issue of providing guidance on proportionality limits on the duty to preserve information *before* any litigation has been commenced.[9] Whether the attorney-client privilege protects communications regarding the preservation of potentially relevant material, and the standards for discovery of such communications if privileged, are elucidated in a third article, co-authored by Judge Grimm, Michael Berman, Leslie Wharton, Jeanna Beck, and Conor Crowley.[10]

The success of the symposium must be credited to all of the participants, with special thanks given for the leadership of Judge Grimm and Michael D. Berman, Esq., who co-teach a cutting edge course in Electronic Discovery at the University of Baltimore. The symposium came to fruition as a result of the countless hours of work by the *Law Review* editorial board and staff, most especially Symposium Editor, Richard Berwanger and Associate Symposium Editor, Kate Hummel, with the encouragement and invaluable support of Jami M. Watt, Editor in Chief; Dean Phillip Closius; Associate Dean Jane Murphy; Snyder Center Director, Professor José Anderson; and the Center's administrative assistant Deborah Thompson.

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8. *See* Kenneth J. Withers, "Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information, 37 U. BALT. L. REV. 349 (2008).

9. *See* Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008).

10. *See* Paul W. Grimm et al., *Discovery About Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?*, 37 U. BALT. L. REV. 413 (2008).